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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91184978
Party	Plaintiff McNeil-PPC, Inc.
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Date	07/15/2011
Attachments	Statement of Objections to Walgreens' Evidence (F0827829).PDF (25 pages) (1024481 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

McNEIL-PPC, INC.,

Opposer,

-against-

WALGREEN CO.,

Applicant.

Opposition No. 91184978

OPPOSER'S STATEMENT OF OBJECTIONS TO APPLICANT'S EVIDENCE

Opposer McNEIL-PPC, Inc. ("McNEIL") herein states its objection to certain evidence sought to be introduced in these proceedings by applicant Walgreen Co. ("Walgreens").

During its testimony period in these proceedings, Walgreens filed the following as its evidentiary submissions (i) the trial deposition testimony of Robert Tompkins, a Walgreens' officer, taken March 28, 2011 ("Tompkins Deposition" or "Tompkins Dep."); (ii) the trial affidavit of Dr. Alex Simonson, a survey expert, dated February 15, 2011 ("Simonson Affidavit" or "Simonson Aff."), for which cross-examination and redirect deposition testimony ("Simonson Dep.") was submitted on May 10, 2011;¹ (iii) a Notice of Reliance on Discovery Deposition Transcripts, dated March 24, 2011; (iv) a Notice of Reliance on Discovery Responses, dated March 24, 2011; and (v) a Notice of Reliance on Official Records, dated March 25, 2011.

As discussed below, McNEIL objects to (i) the Simonson Affidavit in its entirety, and (ii) certain testimony and exhibits Walgreens has attempted to introduce into evidence through the

¹ The parties stipulated that the direct testimony of Dr. Simonson could be entered by affidavit rather than through oral deposition, and that the discovery deposition of Dr. Simonson could be used as his cross-examination and redirect testimony for trial purposes.

Tompkins Deposition. McNEIL respectfully requests that the Board strike the challenged evidence.

ARGUMENT

1. The Simonson Survey Should Be Excluded

McNEIL moves to exclude the testimony of Dr. Alex Simonson (“Simonson”), including his “Report of a Survey to Determine the Likelihood of Confusion, If Any, Between WAL-ZYR Allergy Medications and ZYRTEC” (the “Report”), submitted on behalf of Walgreens in these proceedings because the consumer survey that Simonson conducted and on which he bases his Report is flawed in numerous respects:

Improper Universe. According to the Report, the administrators of the survey approached people in various malls based on age and gender criteria “proportionate to their presence in the population.” (Report at 6.) The administrators then used various screening questions to reach the sample survey population, “defined as adult males and females 18 years of age and older who purchased in the past 6 months or were likely to purchase in the coming 6 months an over-the-counter allergy relief medication” (excluding certain persons who might have special knowledge or insight about the subject matter of the survey). (Report at 4.) However, Simonson never analyzed whether the respondent population was representative of purchasers of over-the-counter allergy medication. (Simonson Dep. at 27:23-29:25.) In fact, although the typical over-the-counter allergy medication purchaser is a woman in her mid-forties with children under the age of 18 (*see* Hooda Dep. at 135:4-127:2 & Opp. Ex. 82), only about 15% of the survey respondents were women in the 35-49 age range (and there is no indication whether such women had children). (*See* Report at 10.) Given the mismatch between the universe of respondents and the actual purchasers of the goods at issue, the Simonson Affidavit

and Report should be excluded. *See Citizens Fin. Group, Inc. v. Citizens Nat. Bank of Evans City*, 383 F.3d 110, 118-19, 120 (3d Cir. 2004) (“A survey of the wrong ‘universe’ will be of little probative value in litigation... [and] the proponent of the survey bears the burden of proving that the universe is proper. . . . If the universe is skewed, then the conclusion will similarly be skewed.”).

Inappropriate Control. The Simonson Survey utilized WAL-ZEE as the mark for the control (*i.e.*, non-test) cell. (Report at 2.) As explained in the Report, “[t]he control stimulus was designed to have the ‘Wal’ prefix but a suffix other than ‘zyr,’ . . . and the ending ZEE [was selected] [as having the same first letter as ZYRTEC and a meaning of the letter Z, the first letter in ZYRTEC.” (Report at 2.) The WAL-ZEE mark was an inappropriate control since it emphasizes “Z,” which is a portion of both the ZYRTEC mark and the WAL-ZYR mark, and could itself be a source of confusion, including since advertising for the ZYRTEC product has emphasized the “Z” portion of the mark. Dr. Simonson himself admitted that the WAL-ZEE mark would “cue [respondents] with the Z.” (Simonson Dep. at 40:12.) Dr. Simonson further admitted that he purposefully chose WAL-ZEE as the control because he thought it would show confusion caused by the letter Z. (*Id.* at 41:4-25.) Because the WAL-ZEE mark was not a proper control, the survey results are suspect and the Simonson Affidavit and Report should be excluded.

Survey Did Not Test for All Types of Confusion at Issue. There are numerous types of confusion at issue in this proceeding, including but not limited to product confusion (consumers mistakenly believe that the WAL-ZYR product is the ZYRTEC product), product source confusion (consumers mistakenly believe that the WAL-ZYR product comes from the same source as the ZYRTEC product), association confusion (consumers mistakenly believe that the

WAL-ZYR product is associated with the ZYRTEC product), authorization confusion (consumers mistakenly believe that the WAL-ZYR product is authorized by the makers of the ZYRTEC product or that the makers of the ZYRTEC product have authorized use of the WAL-ZYR name to signify that the products are of equal efficacy and quality), and ingredient source confusion (consumers mistakenly believe that the active ingredient of both medications come from the same source). Simonson, however, admitted that he did not recall whether he even knew what type of confusion McNEIL was alleging in this opposition, and that he just assumed it was “source[,] affiliation or authorization.” (Simonson Dep. at 10:10-16.) Thus, the survey only tested for confusion as to which company “makes or puts out” the product (*see* Report at 8 (Q1a and Q2a)), and as to confusion based on some undefined “affiliation or association (*see* Report at 9 (Q3a)). (*See also* Report at 2 (“questions were asked to determine confusion as to source, as to affiliation and as to authorization . . .”²)).) Consequently, the survey did not test for all of the types of confusion at issue in this proceeding. (*See, e.g.*, Simonson Dep. at 8:15-10:16 (survey did not test for consumers who confuse the ZYRTEC and WAL-ZYR marks); *id.* at 80:25-85:4 (survey did not test for confusion as to source of active ingredient); *see also id.* at 83:13-84:17 (Simonson does not believe that a consumer who thinks the active ingredient of WAL-ZYR’s product comes from the same company as that of the active ingredient of the ZYRTEC product exhibits actionable confusion for trademark purposes).) The survey results are therefore not probative as to all types of likely confusion relevant to this case, and the Board should therefore not consider the Simonson Affidavit and Report. A survey is deeply flawed for the purposes of a confusion analysis if the study cannot provide reliable evidence as to all

² Although the remainder of this sentence states that the survey also tested for confusion as to “permission,” no such word appears in the survey questions, and there is no evidence that respondents would have understood that any of the survey questions asked about permission.

possible types of confusion that might occur between the marks at issue. *Simon Prop. Group L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1049 (S.D. Ind. 2000) (survey failed to account for potential initial interest confusion).

Improper Administration. Simonson could not account for the instructions that were given to the interviewers or answer specifics about how the survey interviews were conducted. For example, Simonson did not know whether interviewers were affirmatively instructed not to probe (Simonson Dep. at 68:7-70:21), and did not know whether interviewers exhausted the possible responses to questions or failed to do so (*id.* at 72:25-73:23). Without these types of details, it is impossible to assess the survey responses.

In addition, there is evidence that interviewers improperly recorded whether they were recording a test cell or control cell. At least one respondent whom the interviewer coded as being in the test cell actually was in the control cell, as evidenced by the respondent mentioning the control mark, WAL-ZEE, in one of his responses. (See Simonson Dep. at 108:22-109:14.) If this particular respondent had not happened to mention the control mark in his responses, no one would have known that the respondent had been marked in the incorrect survey cell. This suggests that there could have been many respondents marked in the wrong cell, who just did not happen to call attention to that fact through their responses. In fact, some of the respondents in the control cell who mentioned the ZYRTEC mark – and thus would have been used by Simonson to cancel respondents in the test cell who mentioned ZYRTEC for purposes of assessing the total level of confusion – may have in fact been shown the test mark, WAL-ZYR. There is simply no way to tell – and this makes Simonson’s survey analysis suspect.

Given the above problems with the survey’s administration, the Board should exclude the Simonson Affidavit and Report.

Potentially Improper Testing Locations. The Simonson Survey was conducted in twelve enclosed malls. (Report at 2.) However, Simonson did not know if the malls contained Walgreens stores, or even if screening of potential respondents was done right outside a Walgreens store. (See Report at 2 (“Respondents were screened on the mall floor”); Simonson Dep. at 112:7-22.) If the testing was done outside Walgreens stores, or even at malls that had Walgreens stores, the universe of respondents could have been improperly skewed towards respondents who are loyal Walgreens consumers or otherwise overly familiar with Walgreens’ house brand products, which could have skewed the survey results. This flaw also calls for exclusion of the Simonson Affidavit.

Confusing Compound Questions. The Simonson Survey included a number of compound questions, including:

- Q 1a: “Though you may or may not have seen or heard of this specific brand name before, do you have an opinion as to what company *makes or puts out* the products using the name shown on this card?” (Report at 8 (emphasis added).)
- Q2a: “Do you believe that the company that *makes or puts out* the products using the name shown on this card, makes or puts out any other *products or brands, or not?*” (Report at 8 (emphasis added).)
- Q3a: “Do you believe that the company that *makes or puts out* the products using the name shown on this card is *affiliated with or authorized by* any other *company or brand, or not affiliated with or authorized by any other company or brand?*” (Report at 9 (emphasis added).)

Simonson admitted that these are compound questions, stating, for example, that “makes” and “puts out” mean different things (Simonson Dep. at 55:4-57:2), as do “products” and “brands” (*id.* at 61:12.). The inclusion of compound questions renders both the questions and the answers ambiguous. As the Report itself advises, “the generally accepted standards and practices in the industry for designing and implementing survey research” include the condition that “[t]he

questions be framed in a clear, precise . . . manner” (Report at 4.)³ Because of the ambiguity injected into the survey results by the use of compound questions, the Simonson Affidavit and Report should be excluded.

Open-Ended Questions With No Clear Instructions for Follow-Up. Although the Simonson Survey included a number of open-ended questions (*e.g.*, questions Q1b, Q1c, Q2b, Q2c, Q3b, Q3c), there were no clear instructions for follow-up. Further, although Dr. Simonson stated that interviewers are supposed to be instructed “not . . . to probe for anything else unless they’re specifically advised to do that,” and how to respond to “incomplete answers,” none of that information was included in the instructions for the interviewers in this case. (*Id.* at 68:7-70:21.) Moreover, Simonson did not know whether interviewers had probed respondents or not. (*Id.* at 73:9-23, 74:7-9.) Given the lack of clear instructions, and the potential for prejudice that could have been introduced into the survey by some interviewers probing for additional responses and some interviewers not, the Board should exclude the Simonson Affidavit and Report.

Inadequate Evidence of Survey Certification. After respondents completed the survey interview, the interviewer apparently was supposed to fill out a “Certification Page” with the respondent’s interview identification number and the respondent’s contact information, and then the respondent was supposed to sign the “Certification Page.” (*See, e.g.*, Opp. Ex. 250 at W4332.) While Simonson produced copies of these “Certification Pages,” the pages apparently were redacted to remove all identifying information about the respondents. (*See* Opp. Ex. 250.) These redactions make it impossible for McNEIL to determine whether the proper certification

³ Surprisingly, Simonson admitted that he did not conduct any pilot surveys or pre-tests to ensure that his questions made sense and were eliciting answers that made sense. (Simonson Dep. at 35:5-24.)

of the interviews was in fact carried out. Although McNEIL requested that Simonson provide copies of the “Certification Pages” in which at least some information about the respondents (such as first name and city) was not redacted so that McNEIL could judge whether the interview certification process was in fact completed, Simonson refused to comply. (See Exhibit A hereto.) McNEIL can only assume that Simonson’s refusal to comply was based on a need to hide problems with the certification process, making the entire survey results suspect. This is yet another reason for the Board to exclude the Simonson Affidavit and Report.

Discrepancies in Survey Verification. According to the Report, 66% of the survey respondents were contacted to confirm their participation in the survey and their qualification for the survey. (Report at 9, 10.) Two persons reported during this validation process that they had not purchased in the last six months, and did not intend to purchase in the next six months, over-the-counter allergy medications – in other words, that they were improperly included in the survey universe. (Simonson Dep. at 32:10-19.) Simonson himself admitted that such discrepancies would suggest that there were “systemic problems in the survey.” (See Simonson Dep. at 34:14-20.)⁴ Given that 34% of the respondents were never reached for validation, the

⁴ Simonson attempted to correct his deposition testimony on this point by adding the word “not” after “there are” and before “systemic problems in the survey,” alleging that the change was made to correct a “transcription error.” (See Simonson Dep. at 34:18-20; Dr. Simonson’s Errata Sheet for the Deposition of Alex Simonson Taken October 1, 2009, dated January 22, 2010 (“Simonson Errata”).) However, Simonson cannot change his testimony in this manner. There is no evidence to suggest that the stenographer mistook Simonson’s original testimony. Moreover, the rule permitting for changes to deposition transcripts, Rule 30(e) of the Federal Rules of Civil Procedure, is to be used for solely for “corrective, and not contradictory, changes.” *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1226 (9th Cir. 2005); see also *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 n. 5 (10th Cir. 2002) (“The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. . . . A deposition is not a take home examination.”) (quotation and citation omitted). Even if Simonson were permitted to make such a change to his testimony through an errata notice, the fact that Walgreens did not serve McNEIL with the errata to the Simonson

“systemic problems in the survey” could significantly alter the survey results as reported by Simonson. These “systemic problems” call for exclusion of the Simonson Affidavit and Report.

Inaccurate Analysis of Survey Results. Simonson’s method for analyzing the survey results was shoddy, inappropriate for use and reliance in connection with a formal proceeding. To analyze the results, Simonson merely highlighted data related to certain respondents as he viewed a document on his computer, then manually counted the highlighted responses. When he later shut off his computer, all the highlighting – and therefore the analysis that went into his results – disappeared. (Simonson Dep. at 123:24-124:18.) He incorporated no quality check of his manual highlighting and counting, and knew that his analysis would disappear when he shut down his computer. (*See id.*) Not only were his analysis methods questionable, nowhere in the Report does Simonson indicate which respondents he counted as confused. Simonson himself recognized this as a problem, admitting at deposition that when he went to review his analysis in preparation for the deposition, he had to redo the analysis from scratch. (*Id.* at 95:17-96:3.) Simonson thus effectively prevented McNEIL from reviewing his calculations of the percentage of confused participants.

deposition within the time frame set forth in Rule 30(e) requires the Board to exclude the errata. Although Walgreens received a copy of the Simonson deposition transcript on October 19, 2009 (*see* Exhibit B hereto), Walgreens did not serve McNEIL with the notice of errata until May 11, 2010 (*see* Exhibit C hereto) – that is, not until more than six months had elapsed after the transcript became available, well beyond the 30-day time limit set forth in the governing rule. There was no agreement between the parties that the errata could be delayed. Since Walgreens did not attempt to submit an errata sheet to make substantive changes to Simonson’s deposition testimony until after the 30 days permitted under Rule 30(e), the proposed changes included in the untimely Simonson Errata must be excluded and the Board must read the Simonson deposition testimony as originally recorded. *See Delaware Valley Floral Group, Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1379-80 (Fed. Cir. 2010) (untimely errata sheet attempting to substantively alter deposition testimony was not admissible).

Despite this, there are definite indications that Simonson's analysis of the survey results was flawed. For example, one respondent (identified as number 26908) stated in response to Question 1b that the company who makes or puts out the WAL-ZYR product is "some type of Wal-Mart brand of Zyrtec." (Simonson Dep. at 89:13-17.) Simonson asserts that he did not count this respondent as evidencing confusion because, in his view, the response indicates that "[t]hey [sic] believe this is the Wal-Mart version of the physical brand Zyrtec. So this is their [sic] way of suggesting this is the Wal-Mart generic version of Zyrtec." (*Id.* at 89:21-24.) However, there is nothing in the respondent's answer (as recorded allegedly verbatim by the interviewer) that states the belief that Simonson reads into the answer; that belief is just something that Simonson has made up himself. (*Id.* at 91:9-18, 93:4-18.) And while Simonson admits that some people think that the makers of national brand products also make store brand products (*id.* at 91:19-92:4), he refused to consider that respondent 26908 shared such a belief even though he admitted that he had no idea what was in the respondent's mind. (*Id.* at 92:5-13, 93:4-18.) Moreover, he refused to count respondent 26908 as confused even though he counted another respondent who answered in almost the exact same terms ("it looks like the Wal-Mart brand Zyrtec") as confused. (Simonson Dep. at 94:13-22.)

Simonson additionally admitted that he failed to count respondents who thought the WAL-ZYR product was made by the same company that makes ZYRTEC, even though his survey questions allegedly were designed to seek out this very information. For example, Simonson refused to count as confused a respondent who answered "Tylenol" when asked what other products are made by the company that makes WAL-ZYR – even though McNEIL does in fact manufacture and distribute TYLENOL pain reliever. (*See* Simonson Dep. at 105:14-21 (indicating that he *might* have counted the respondent as confused but that he would "have to

check to be sure”) & Exhibit B (confirming that he did *not* count respondent 91044 as confused).) Simonson provided no explanation for his refusal to count this respondent as confused.

Since Simonson’s analysis methods were questionable, and since not only McNEIL but also the Board cannot know which respondents Simonson counted as confused and which he did not, and since there is evidence that Simonson did not count every respondent who arguably evidenced confusion, the survey results reported by Simonson are suspect, and the Board should consequently exclude the Simonson Affidavit and Report.

2. Certain Tompkins Testimony and Exhibits Should Be Stricken

McNEIL seeks to exclude certain portions of Robert Tompkins’ testimonial deposition and certain exhibits attempted to be entered into evidence through Mr. Tompkins’ deposition as follows:

Exhibit 19. According to Mr. Tompkins’ testimony, Exhibit 19 is a collection of select pages from “hundreds” of Walgreens’ Sunday circular advertising inserts “going back years if not decades.” (Tompkins Dep. at 72:21-73:3, 73:17-21.) However, Mr. Tompkins did not properly authenticate Exhibit 19. He could not state for certain whether the pages in Exhibit 19 represented “true and correct copies of the pages that would have appeared in the actual [advertising circulars],” only that he “believe[d] so.” (Tompkins Dep. at 74:1-4.) This exhibit should therefore be excluded.

Exhibits 23-25. According to Mr. Tompkins, Exhibits 23 through 25 are records of customer comments received by Walgreens concerning the WAL-ZYR product. (*See generally* Tompkins Dep. at 85:11-90:2.) However, Mr. Tompkins admitted that he did not compile the reports himself, did not do the search that resulted in the reports himself (the reports contain only a selection of information available in the relevant Walgreens’ databases, namely, comments

referencing WAL-ZYR), that he does not know if whoever did the search looked for comments on ZYRTEC, and further that he does not even know whether the documents represent every record in the selected databases of consumer comments on WAL-ZYR. (Tompkins Dep. at 113:6-115:8.⁵) Because Tompkins cannot verify the contents of the exhibits, the exhibits, along with Mr. Tompkins' affirmative testimony regarding the exhibits and the implications of those exhibits – specifically, Tompkins Dep. at 85:11-87:17, 88:6-90:14 – should be stricken.

CONCLUSION

For the reasons stated above, McNEIL requests that the Board exclude the Simonson Affidavit, including the Report, and that the Board exclude Applicant's Exhibits 19 and 23-25 as well as the corresponding testimony of Mr. Tompkins.

Respectfully submitted,



Laura Popp-Rosenberg, Esq.
Giselle C. Woo, Esq.

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Dated: July 15, 2011

⁵ In light of Mr. Tompkins' admissions on cross-examination, Tompkins' direct testimony to the contrary (Tompkins Dep. at 88:9-16 at 89-3) cannot be relied upon.

EXHIBIT A

Giselle Woo

From: Stevens, Caroline [cstevens@leydig.com]
Sent: Friday, September 11, 2009 4:20 PM
To: Laura Popp-Rosenberg
Cc: Richard Lehv; Liss, Mark
Subject: McNEIL v. Walgreens; LVM Ref. 262981

Dear Laura:

Dr. Simonson is qualified to substantiate the survey methodologies, and McNeil can confirm that the signatures on the Certification pages were redacted by deposing him.

The survey participants' names (first and last) are redacted from the Certification pages for privacy reasons and so survey takers can ensure the participants' complete anonymity, without which some people may not have participated in the survey. There is a hand-written number on each Certification page that is used to identify each individual participant while still ensuring the participants' anonymity. Finally, modifying the redactions to reveal the first names of the participants would be quite costly, and there is no justification for such an expense in this case. Dr. Simonson is well-qualified and well-respected, and there is no reason to think that he fabricated any responses. Thus, we do not intend to produce copies of the Certification pages that show the survey participants' first names.

Regards,

Caroline

Caroline L. Stevens - (312) 616-5731 - cstevens@leydig.com

From: Laura Popp-Rosenberg [<mailto:lpopp-rosenberg@frosszelnick.com>]
Sent: Thursday, September 10, 2009 4:19 PM
To: Stevens, Caroline
Cc: Liss, Mark
Subject: RE: McNEIL v. Walgreens; LVM Ref. 262981

Dear Caroline:

It is hard for us to confirm that there were actually signatures if they have been redacted. Since I assume the redactions were for alleged privacy concerns, perhaps Mr. Simonson could redact just the last names?

Regards,
Laura

Giselle Woo

From: Stevens, Caroline [cstevens@leydig.com]
Sent: Thursday, September 10, 2009 5:14 PM
To: Laura Popp-Rosenberg
Cc: Liss, Mark
Subject: RE: McNEIL v. Walgreens; LVM Ref. 262981

Dear Laura:

Dr. Simonson said that the signatures on the Certification pages were redacted. We sent you the pages as we received them from Dr. Simonson.

Regards,

Caroline

Caroline L. Stevens - (312) 616-5731 - cstevens@leydig.com

From: Laura Popp-Rosenberg [<mailto:lpopp-rosenberg@frosszelnick.com>]
Sent: Thursday, September 10, 2009 2:13 PM
To: Stevens, Caroline
Subject: McNEIL v. Walgreens

Dear Caroline:

Walgreens' production pages W4332-4735 appear to be respondent certification pages from the Simonson survey. However, the instructions on those pages state that the respondent was to sign the page. None of the pages appear to have signatures. The pages have not been mark redacted. Could you please advise whether the pages have indeed been redacted? And, if so, the basis for the redaction?

Regards,
Laura

Laura Popp-Rosenberg | Fross Zelnick Lehrman & Zissu, P.C.
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EXHIBIT B

Giselle Woo

From: Stevens, Caroline [cstevens@leydig.com]
Sent: Tuesday, October 20, 2009 3:18 PM
To: Laura Popp-Rosenberg
Subject: McNeil v Walgreens; LVM Ref. 262981
Attachments: W5237-5263.pdf\$\$\$.pdf

Laura,

Please find attached Walgreens supplemental document production W5236-W5263.

We note that Respondent 91044 is not listed on Dr. Simonson's tally sheet as evidencing confusion. During the deposition, Dr. Simonson indicated that he would have to check whether he considered Respondent 91044 to be confused. Dr. Simonson checked, and he said he did not (and still does not) consider Respondent 91044 to be confused given the respondent's mention of WAL-MART and Advil and other responses. We received the deposition transcript yesterday, and we will provide the errata sheet as soon as possible.

Regards,
Caroline

Caroline L. Stevens
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Chicago, Illinois 60601
Tel: (312) 616-5671
Fax: (312) 616-5700
E-mail: cstevens@leydig.com

EXHIBIT C

Giselle Woo

From: Stevens, Caroline [cstevens@leydig.com]
Sent: Tuesday, May 11, 2010 10:23 PM
To: Laura Popp-Rosenberg
Subject: Simonson Corrections and Confidentiality Designations
Attachments: Simonson Corrections and Confidentiality Designations.PDF^.PDF

Dear Laura,

We are sending you the attached document by mail, too.

Regards,

Caroline

Caroline L. Stevens
Leydig, Voit & Mayer, Ltd.
1420 Fifth Ave., Suite 3670
Seattle, WA 98101
(206) 428-3111 (tel)
(312) 616-5700 (fax)
cstevens@leydig.com

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

McNEIL-PPC, Inc.	)	In re Trademark Application
	)	Serial No. 76/682,070
Opposer,	)	Opposition No. 91184978
	)	Trademark: WAL-ZYR
v.)	
)	
WALGREEN COMPANY,)	
)	
Applicant.)	

DECLARATION

I hereby certify that I have read the foregoing transcript of my deposition given on October 1, 2009 in New York, New York, consisting of pages 1 through 128, inclusive, and I do again subscribe and make oath that the same is a true, correct, and complete transcript of my deposition so given as aforesaid, and includes changes, if any, so made by me.



ALEX SIMONSON, PH.D.

Subscribed and sworn to before me
this 22 day of January 2010.


Notary Public

KENDRIA T FRANCIS
Notary Public
State of New Jersey
My Commission Expires Jul 29, 2014

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

McNEIL-PPC, Inc.	)	In re Trademark Application
	)	Serial No. 76/682,070
Opposer,	)	Opposition No. 91184978
	)	Trademark: WAL-ZYR
v.)	
)	
WALGREEN COMPANY,)	
)	
Applicant.)	

ERRATA SHEET FOR
DEPOSITION OF ALEX SIMONSON
TAKEN OCTOBER 1, 2009

I, Alex Simonson, do hereby certify that I have read the foregoing transcript of my testimony taken on October 1, 2009, and I have signed it subject to the following changes:

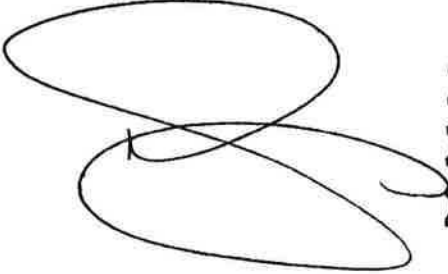
Page	Line(s)	From	To	Why
7	7	TTAB	For TTAB	Transcription error
8	8	It's such a new product	Unsure	Transcription error – some part of the sentence is missing
14	8	I write	I wrote	Transcription error
28	21	Screen	Screening	Transcription error
33	16-17	Telephone the respondents when their back	Telephoning the respondents when they're back	Transcription error
34	20	Are systemic problems	Are not systemic problems	Transcription error
38	17	Black letters	Block letters	Transcription error
38	25	Substantiation	Instantiation	Transcription error
39	6	Black letter	Block letter	Transcription error
41	21-22	Evidence confusion	Evidence of confusion	Transcription error
44	3	Different than	Different from	Transcription error
44	22	Tester control	Test or control	Transcription error
44	24	Testing	Test cell	Transcription error
45	8	Screen quotas	Screening quotas	Transcription error
45	12	Testing controls	Test and controls	Transcription error
51	9	The often	They often	Transcription error

53	14	Going be providing	Going to be providing	Transcription error
53	22	Brand	Brands	Transcription error
56	11-13	From a respondent point of view, there are various ways get the idea, a the general idea of the origin of this product.		Not sure what the grammatical structure was of these sentences – there’s some kind of transcription error
58	6	Researches	Research	Transcription error
60	18-19	Determine respondents	Determine whether respondents	Transcription error
64	2	Tests	Test cell	Transcription error
65	2	To high	Too high	Transcription error
71	16	Supposed wait	Supposed to wait	Transcription error
91	12-13	Understanding of you propose	Unsure	Something I stated is missing – not sure what – transcription error
94	16-17	It looks like the Wal-Mart brand of Zyrtec	It looks like the Wal-Mart brand Zyrtec	Transcription error
95	3	Wal-Mart brand of Zyrtec	Wal-Mart brand Zyrtec	Transcription error
105	14-21		I stated that I would “have to check” whether Respondent No. 91044’s response was counted in my report as evidence of confusion. After checking, I confirmed that the response was <i>not</i> counted.	Verification required as indicated during deposition.
122	12-13	Safe (multiple times)	Save	Transcription error
124	19-22		When I recalculated the figures, I noted that Respondent No. 24634’s response was evidence of noise that inadvertently had not been included in my report. This respondent was part of the control cell and reduces – not increases – the final confusion figure.	Clarification of testimony



ALEX SIMONSON, PH.D.

Subscribed and sworn to before me
this 22 day of January, 2010.



KENDRIA T FRANCIS
Notary Public
State of New Jersey
My Commission Expires Jul 29, 2014

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

McNEIL-PPC, Inc.	)	In re Trademark Application
	)	Serial No. 76/682,070
Opposer,	)	Opposition No. 91184978
	)	Trademark: WAL-ZYR
v.)	
)	
WALGREEN COMPANY,)	
)	
Applicant.)	

CONFIDENTIALITY SHEET FOR
DEPOSITION OF ALEX SIMONSON
TAKEN OCTOBER 1, 2009

Start*	Stop	Designation	Start	Stop	Designation
39:18	39:25	Confidential	74:20	77:11	Confidential
40:1	40:14	Confidential	78:1	78:24	Confidential
41:24	41:25	Confidential	79:16	80:24	Confidential
51:16	51:25	Confidential	82:1	82:22	Confidential
52:1	52:25	Confidential	86:12	86:25	Confidential
53:16	53:23	Confidential	87:15	112:6	Confidential
55:4	57:25	Confidential	114:10	115:9	Confidential
58:2	58:6	Confidential	116:22	117:8	Confidential
58:16	58:22	Confidential	119:12	120:10	Confidential
59:19	60:25	Confidential	121:15	121:20	Confidential
61:1	67:25	Confidential	123:1	123:23	Confidential

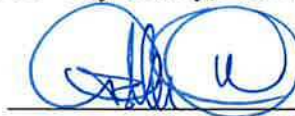
*Format is Page:Line

Date: May 11, 2009

/s/Caroline L. Stevens_____
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Attorneys for Walgreen Co

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Opposer's Statement of Objections to Applicant's Evidence** to be deposited with the United States Postal Service as First Class mail, postage prepaid, in an envelope addressed to counsel for Walgreen Co., Mark Liss, Esq., Leydig, Voit & Mayer, Ltd., Two Prudential Plaza, 180 N. Stetson Avenue, Suite 4900, Chicago, IL 60601, this 15th day of July, 2011.



Giselle C. Woo